No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1941

HOWARD HALL COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

JANUARY 1942.

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STATUTES INVOLVED

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OPINION BELOW

The opinion of the specially constituted District Court (R. 43) is reported in 38 F. Supp. 556. The report of the Interstate Commerce Commission (R. 8), hereinafter called the Commission, is reported in 24 M. C. C. 273.

JURISDICTION

The final decree of the District Court (R. 53) was entered April 17, 1941, and the appeal was

allowed May 15, 1941 (R. 57). Probable jurisdiction was noted October 13, 1941. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C. [Supp. III], secs. 45 and 47a), and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat.)

QUESTIONS PRESENTED

The appellant, by application filed with the Commission under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (Part II, Interstate Commerce Act), sought a certificate of public convenience and necessity authorizing continuance of operation as a common carrier of general commodities (all commodities suitable for transportation in an ordinary truck, with certain exceptions) over irregular routes between any and all points within practically all the States east of the Mississippi River except the New England States (R. 9). The Commission, after hearing, granted a certificate authorizing the continuance by appellant (1) of operations as a common carrier of general commodities over irregular routes between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia, Mississippi, and the northern portion of Florida, and (2) of opera-

tions as a common carrier of certain specified commodities over irregular routes between certain designated points. In all other respects the application was denied by the Commission's order. The District Court sustained the order as valid and, in this Court, the appellant has abandoned certain contentions advanced below. The questions presented here are:

(1) Whether the Commission, in granting appellant authority to operate between Birmingham and its industrial area,[1] on the one hand, and points in other States, on the other hand, either erred as matter of law, or acted arbitrarily, in failing to extend such authority to cover a "belt" of territory of 100-mile radius encircling the city.

(2) Whether, in those instances where the Commission found that appellant carried, during the "grandfather" period, only one commodity, or a few particular commodities, with such degree of regularity as to constitute substantial service, it was, nevertheless, required by the statute to grant operating authority covering "general commodities."

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[1] The Commission, in prescribing the 10-mile zone, said (R. 12):

"The extent of this industrial area is not clear from the record, but we believe that a radius of 10 miles of Birmingham will include all that is important."

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal from a final decree (R. 53) of the court below dismissing a petition filed by the appellant motor carrier to enjoin and set aside an order entered by the Commission in a proceeding entitled *Howard Hall, Inc., Common Carrier Application,* No. MC-42318, 24 M. C. C. 273.

The Commission proceeding was instituted by application filed by the carrier February 11, 1936, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (Part II of the Interstate Commerce Act) asking authority to continue operation as a common carrier by motor vehicle of general commodities between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, and the District of Columbia, all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson, Tex.[2]

[2] Subsequently the appellant withdrew its application with respect to all points in Wisconsin, Texas, Arkansas, Kansas,

Section 206 (a) provides that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway * * * unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." This is subject to the proviso (the "grandfather" clause) to the effect that if any such carrier was in bona fide operation on June 1, 1935, "over the route or routes or within the territory for which application is made," and has so operated since that time, except as to interruptions over which it has no control, the Commission shall issue such certificate without requiring further proof of public convenience and necessity. Pending determination of the application the applicant is authorized to continue operations. Section 208 (a) provides that the certificate issued under section 206 (a) shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate."

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and Missouri, points in Florida south of Tampa and Lakeland, and points north of Chicago. After this change the application prayed a "general commodity" certificate covering operations between all points in Alabama, Georgia, North Carolina, South Carolina, Kentucky, Tennessee, Indiana, Ohio, Mississippi, Louisiana, Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, Florida north of Tampa and Lakeland, Illinois south of Chicago, and those parts of Michigan within 200 miles of Detroit and Benton Harbor.

A number of competing railroads and motor carriers intervened in the Commission proceeding in opposition to the application. Two hearings were held in Birmingham, Ala., the one in February 1937 and the other August 20, 1937, on application by appellant for reopening to introduce additional evidence.[3] A recommended report was prepared by a Commission examiner, to which exceptions and briefs were filed by various parties to the proceeding, including appellant. On July 10, 1940, the Commission made its report and order (R. 8, 14), by which it authorized the continuance by appellant (1) of operations as a common carrier of general commodities (with specified exceptions)[4] over irregular routes between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, South Carolina, Mississippi, and those in Florida north of a designated line, and (2) of operations as a common carrier over irregular routes of—

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[3] The record in this Court omits the evidence before the Commission, a transcript of which appellant introduced in evidence in the District Court. The appellant in its brief (p. 2) says: "The findings of the Interstate Commerce Commission as set out in its opinion are sufficient to raise the issues involved in this case."

[4] The exceptions specified were "commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection with so-called household movings" (R. 13).

"* * * paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham, of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham, of cloth from Alabama City, Ala., to Wheeling, W. Va., and of matches from Wheeling to Chattanooga and Birmingham" (R. 13).

The application was in other respects denied.

The Commission, in support of that part of its order which authorized appellant's operations as a general commodity carrier just above described, pointed out that a large proportion of the shipments shown to have been carried by appellant prior to the "grandfather" date, had moved between Birmingham and its industrial area and the four States and part of Florida covered by the authority so granted, and that the shipments had been made to numerous points of destination and had included a wide variety of commodities (R. 10). With respect to those operations the Commission found that appellant had not only held itself out to carry general commodities between Birmingham and vicinity and all points in the particular States but "had actually conducted an operation consistent with such holding out" (R. 11). In answer, however, to the contention of appellant that it was entitled to authority to operate "between Birmingham and points within

100 miles thereof, on the one hand * * *" (R. 12), the Commission pointed out in its report that the appellant had carried prior to the "grandfather" date only 55 shipments to, or from, the 100-mile area referred to, and that it had served only 12 points in that extensive area.[5] Thereafter the Commission stated that undoubtedly—

> "applicant did serve various industries located in the immediate vicinity of Birmingham. The extent of the industrial area is not clear from the record but we believe that a radius of 10 miles of Birmingham will include all that is important" (R. 12).

As for that part of the order which authorized appellant's operations as a carrier of particular commodities, the Commission pointed to the fact that in addition to the evidence of shipments of a wide variety of commodities between Birmingham and points in the five southern States, the record showed shipments prior to the "grandfather"

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[5] The Commission detailed its findings concerning appellee's operations in the region of Birmingham by stating:

"Of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, 55 moved to or from points within 100 miles of Birmingham, 50 moved between points in States other than Alabama, and 15 moved from Fowl River, Ala. * * *

"Of 2,550 shipments handled after June 1, 1935, 2,030 moved to or from Birmingham, 270 moved to or from points within 100 miles of Birmingham, and 250 moved between points in States other than Alabama" (R. 10).

date of the particular commodities covered by the authorization between Birmingham and specific points in other States and between certain other specific points (R. 11). Certain other commodities referred to in the report as having been carried by appellant between Birmingham and other specific points and between specific points, not including Birmingham, were not shown to have moved in such quantity and with such degree of regularity as to constitute substantial service.

As will have been seen, appellant's application covered a large part of the United States. It was amended at the first hearing to exclude certain States west of the Mississippi River (R. 9) and the report deals with the amended application. Referring to it generally, the Commission said:

> "* * * Although applicant claims 'grandfather' rights to conduct operations between all points in a vast territory comprising practically all of the United States east of the Mississippi River except the New England States, the record shows that prior to June 1, 1935, its traffic moved preponderately between Birmingham and vicinity, on the one hand, and various other points in eastern United States on the other. * * *" (R. 9).

The Commission later mentioned that appellant's headquarters were located at Birmingham and that it owned, as of June 1, 1935, "11 trucks

which number had increased to 17 at the time of the first hearing in February 1937" (R. 9, 12). In disposing of the application in respects not dealt with by the authorization granted, the Commission said:

> "It is clear that shipments other than those described above, moving prior to June 1, 1935, between points in States other than Alabama, and between Birmingham and vicinity, on the one hand, and other States, on the other, were not made with any degree of regularity and do not represent a substantial showing of service sufficient to establish bona fide operations since prior to June 1, 1935, from, to, and between all points in the broad territory claimed. No shipments whatever are shown to have been handled by applicant prior to June 1, 1935, to or from points in Delaware, Maryland, Michigan, New Jersey, and the District of Columbia" (R. 13).

Appellant, on February 28, 1941, filed a petition asking that the Commission's order be enjoined and set aside insofar as it denied appellant's application (R. 1). The defendants, the United States and the Commission, filed answers denying all material allegations of the petition (R. 18, 20). On April 14, 1941, the hearing before the specially constituted three-judge court was held, at which hearing a certified copy of the record made before the Commission was introduced in evidence, and the case was orally argued and submitted for

decision. On April 17, 1941, the Court filed its opinion sustaining the Commission's order as in all respects valid (R. 43). On the same date the Court filed its findings of fact and conclusions of law (R. 49) and entered its final decree dismissing the petition (R. 53).

While appellant's petition advanced several grounds in support of the relief asked for, it relies upon two only in this Court, which are shown in the "Specifications of Error" in appellant's Brief, and in the "Questions Presented" in this brief, page 2, *supra.*

SUMMARY OF ARGUMENT

Since the appellant has not produced the record of evidence taken in the Commission proceeding, this appeal is subject to "the settled rule that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made." *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282, 286, and cases cited. Apparently appellant's "Specifications of Error" are intended to raise questions only as to the Commission's statutory authority and arbitrary action. The latter, so appellant asserts, is shown by the findings, but it is rarely the case that a charge of arbitrary action may be properly made without producing the record.

The appellant does not challenge the Commission's order in the respect that it denied wholly

the larger part of appellant's application. Its contentions are made in connection with the authority which was granted to it by the order. The order grants authority for the continuance by appellant (1) of operations as common carrier of general commodities between Birmingham and points within 10 miles thereof, on the one hand, and on the other, all points in four southern States and the northern part of Florida, and (2) of operations as common carrier of particular commodities between specific points.

1. With respect to the authority granted appellant to operate between Birmingham and the 10-mile area outside the city limits and points in the five southern States, the appellant contends that the Commission exceeded its jurisdiction and acted arbitrarily and capriciously (Br. 3–5) in authorizing an area around Birmingham of 10 miles instead of the 100-mile area claimed by the appellant. The Commission found in its report (R. 12) that appellant had carried prior to the "grandfather" date "only 55 shipments" to or from the 100-mile area and had served "only 12 points" within that area. It further found that the "applicant, however, undoubtedly did serve various industries located in the immediate vicinity of Birmingham"; that "the extent of this industrial area is not clear from the record, but we believe that a radius of 10 miles of Birmingham will include all that is important."

These findings make clear that the Commission considered that the shipments carried by appellant, during the "grandfather" period, to, or from, an area comprising a "belt" of territory of 100-mile radius extending beyond, and around, the city limits of Birmingham did not entitle it to operating authority covering that territory; and that if the appellant was entitled to any area beyond the city limits, it was because it undoubtedly "did serve various industries in the immediate vicinity of Birmingham." The record was not clear as to the extent of this industrial area but the Commission believed that a radius of 10 miles of the city would include all that was important. In short, the Commission found that the 55 shipments carried to the 12 points did not constitute such substantial service as to entitle appellant to operating authority covering that extensive territory as an independent right. It granted it, however, a 10-mile part of the territory claimed as an area connected with the serving of the city, justifying this by its belief that the appellant undoubtedly had served various industries in the immediate vicinity of Birmingham. The record made by the appellant was not clear, but the report shows that the Commission unquestionably gave it the benefit of any doubt. As stated in *Alton R. R.* v. *United States* (Nos. 110 and 267, this Term, decided January 12, 1942), an "applicant carries

the burden of establishing his right to the statutory grant."

The Commission's report shows on its face that the action which appellant sets up as arbitrary and capricious was, on the contrary, liberal to the appellant. In fact appellant's charge of arbitrary action seems to be based (Br. 4, 5) principally on its view that the statute leaves the Commission with no administrative judgment in a case such as it presented. The appellant's position is in effect that it laid claim to the 100-mile "belt" of territory (R. 12); that the Commission found that it had carried shipments to that territory during the "grandfather" period, and that, regardless of their number (Br. 5), it was bound to grant authority in accordance with the undisputed evidence so shown of its operation during the "grandfather" period, to wit: "Between Birmingham, Alabama, and 100-mile radius thereof to points in the other States" (Br. 4). This apparent view of appellant that the Commission, having found that shipments had been carried into the territory claimed by it, had no further duty to perform except the ministerial one of issuing to appellant a certificate of operating authority covering the territory appears to rest (Br. 7) on its conception of those words of the statute (Sec. 206 (a), Motor Carrier Act, 1935) which provide for certificates authorizing operation "* * * over the route or routes or within the territory for which application is made * * *."

This provision is the one under which the Commission authorizes irregular-route operations, but the Commission has not, of course, considered that it was required upon any showing of operation during the "grandfather" period to grant operating authority covering the territory claimed by an applicant. The words "within the territory" evidence the intention of Congress to vest the Commission with a latitude of judgment sufficient to produce reasonable results.

2. With respect to the authority which the Commission granted appellant to operate as a common carrier of particular commodities between specific points, the appellant contends that the Commission erred as matter of law in limiting the authority to specified commodities. Its contention is in effect that the Commission, having found that it was engaged during the "grandfather" period in bona fide transportation of a particular commodity, or particular commodities, between the points was bound by that finding to grant operating authority covering general commodities. The appellant rests this contention on the fact that the statute does not expressly authorize the Commission to grant certificates covering specified commodities, and on its statement that the universal conception of a common carrier is one carrying general commodities. Appellant particularly points to the fact that certificates of public convenience and necessity issued to railroads have always contemplated the carriage of

general commodities. But the differences between the operations, service, and practices of railroads on the one hand from those of motor carriers on the other are matters of common knowledge, and Congress before enacting the Motor Carrier Act had given long consideration to the operations of motor carriers and the place occupied by them in the transportation service rendered the public.

Congress has prescribed the standard of "bona fide operation" for the Commission's guidance. The fact that the evidence of a motor carrier's operations during the "grandfather" period was adequate to enable the Commission to find that it was bona fide engaged in the transportation, say, of some single high-rated commodity between a city in one State and a city in another State, could not reasonably be expected to enable the Commission to find that the carrier was bona fide engaged in the transportation of general commodities—all commodities suitable for transportation in an ordinary truck, with certain exceptions.

ARGUMENT

I. The fact that the Commission, in authorizing continuance by appellant of operations between Birmingham and its industrial area, on the one hand, and points in other States, on the other hand, failed to extend the area to include a "belt" of territory of 100-mile radius, was not error as matter of law or arbitrary action

The appellant's first contention relates to the authority granted it by the Commission to operate as common carrier of general commodities between

Birmingham and the 10-mile area outside the city limits to points in five southern States. In connection with this authorization, the appellant contends that the Commission erred as matter of law and acted arbitrarily and capriciously in authorizing an area around Birmingham of 10 miles instead of the 100-mile "belt" of territory which it asked the Commission to include in the authorization. Referring to the claim made by appellant to this territory the Commission's report reads (R. 12):

> "On exceptions, applicant concedes that it may not be entitled under the 'grandfather' clause to authority to transport general commodities from, to, and between all points covered by the amended application, but it insists that it is entitled to authority to transport general commodities between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in North Carolina, South Carolina, * * *. As pointed out above, however, only 55 shipments were transported prior to June 1, 1935, to or from points within 100 miles of Birmingham. The record shows further that only 12 points were served in this comparatively large territory surrounding applicant's headquarters at Birmingham. Undoubtedly, however, applicant did serve various industries located in the immediate vicinity of Birmingham. The extent of this industrial area is not clear from the record but we believe that a

radius of 10 miles of Birmingham will include all that is important."

The appellant's contention, presumably, is based on the statements and findings shown in the above portion of the report. Its position is in effect that it applied for the 100-mile "belt" of territory; that the Commission specifically found that it had, during the "grandfather" period transported shipments to and from points within 100 miles of Birmingham; that the Commission must grant a carrier a certificate upon proof of bona fide operation prior to the "grandfather" date; and that the Commission "is without jurisdiction to determine arbitrarily that a certain number of shipments are not sufficient to grant authority in that territory."

It will be seen that the Commission found that appellant had carried prior to the "grandfather" date "only 55 shipments" to or from the 100-mile area and had served "only 12 points" within that area; that it further found that the "appellant, however, undoubtedly did serve various industries located in the immediate vicinity of Birmingham"; that "the extent of this industrial area is not clear from the record but we believe that a radius of 10 miles of Birmingham will include all that is important." These findings make clear that the Commission considered that the 55 shipments carried by appellants did not constitute such substantial service as to entitle it

to operating authority covering that extensive territory as an independent right; that since, however, it had undoubtedly served various industries in the immediate vicinity of Birmingham, it was entitled to have the operating authority include an industrial area in connection with the service rendered the city; that the record did not make possible a definite determination of the industrial area but it believed that a radius of 10 miles from the city would include all that was important. This action was not arbitrary but, on the contrary, was liberal to the appellant especially when it is remembered that the burden of establishing its right was on the appellant. *Alton R. R.* v. *United States, supra.*

Moreover, the appellant is not, apparently, referring to arbitrariness of administrative judgment on the facts. It makes plain that its position is that the statute vested the Commission with no "jurisdiction" to determine what number of shipments was sufficient; that the Commission, having found that shipments had been carried by appellant to and from the territory during the "grandfather" period, "the Commission was bound", regardless of their number, or any other consideration, "to grant authority in accordance with the undisputed evidence of operations" during such period, "to wit: Between Birmingham, Alabama, and 100 mile radius thereof to points in the other States" (Br. 4).

This contention of appellant seems negatived by its statement. It is, in effect, that an applicant for "grandfather" rights need only establish that he made some shipments during the "grandfather" period; for its own claim of territory would, in accordance with the contention, establish his right thereto. The Commission would be left with only the ministerial duty to perform of issuing to such applicant a certificate of operating authority for whatever it saw fit to claim. The extreme to which the logic of appellant's contention leads and to which it is in fact carried here brings conviction that appellant is wrong in its conception of the statute.

The provision of section 206 (a) of the Motor Carrier Act that a certificate shall issue if any such carrier was in bona fide operation "over the route or routes or *within* the territory for which application is made * * *" was plainly not intended to leave the body charged with its administration without judgment as to the extent of the rights, if any, established by a claimant's operation. The words "within the territory" do not indicate that any operation whatsoever establishes an applicant's operating right to the territory applied for but, on the contrary, clearly evidence the intention of Congress to commit to the Commission's judgment the question as to just what right had been established within the territory by an operation therein. The provision is

the one under which applications for "grandfather" rights are required to be submitted to the scrutiny of the Commission. The statute prescribes the standard of "bona fide operation" for the Commission's guidance, and the words "within the territory" are plainly intended to leave to the Commission's determination the question of what bona fide operation within the territory was in fact established. The recent decision in *Alton R. R.* v. *United States, supra,* is, we believe, determinative of this. Here appellant's evidence did not establish that it had "grandfather" right to any of the 100-mile belt of territory as independent territory, but as to 10 miles thereof the Commission determined that it might properly be included as industrial area in connection with the operating authority granted appellant covering the city of Birmingham.

II. The Commission, in those instances where the evidence showed that appellant carried, during the "grandfather" period, only one commodity, or a few particular commodities, with such degree of regularity as to constitute substantial service, was not required as matter of law to grant appellant operating authority covering general commodities

The appellant's second contention (Br. 5) is that the Commission, in those instances where it authorized the appellant to transport particular commodities between Birmingham and specific points in States other than Alabama and between specific points, not including Birmingham, erred

as matter of law because it did not extend such authorization to cover general commodities. This contention, similarly as appellant's first contention, challenges the Commission's "jurisdiction" or statutory authority. Concretely described, appellant's position is to the effect that the Commission, having found that the appellant was a common carrier by motor vehicle and that it was engaged, during the "grandfather" period in the bona fide transportation, for example, of "paper and paper products from Birmingham to New Orleans, La." (R. 11), the statute required of the Commission that it grant appellant authority to transport general commodities. This contention, taken together with appellant's first contention that any shipments shown to have been carried to a territory during the "grandfather" period establishes an applicant's right to the territory claimed, would, if sound, require the Commission, predicated upon its finding of bona fide transportation of paper and paper products from Birmingham to New Orleans, La., to grant appellant authority to transport general commodities, not only to New Orleans, but to all points in Louisiana, which latter State, among others, was claimed in the application.

In the case used for illustration the appellant is shown in the report (R. 11) to have carried only paper and paper products during the "grandfather" period from Birmingham to New Orleans.

This plainly did not constitute substantial service in the transportation of general commodities either for the movement to New Orleans or covering the State of Louisiana.

Appellant states (Br. 9) that the universal conception of a common carrier is one which carries general commodities and it points particularly to the fact that certificates of public convenience and necessity issued to the railroads are not granted for specified commodities. But the differences between the operations, services, and practices of the railroads and those of motor carriers are well known. Congress, before enacting the Motor Carrier Act, had given long consideration to the motor carrier industry and it cannot be assumed to have legislated without knowledge of the operations which motor carriers in fact conduct. *United States* v. *Maher*, 307 U. S. 148. The Commission's decision here gives effect to the *actual* operations and service which appellant's evidence showed that it was performing substantially during the "grandfather" period. Between Birmingham and the five southern States it was shown to have been engaged in the transportation of a wide variety of commodities, entitling it to a certificate covering general commodities. Between Birmingham and New Orleans it was shown to have been engaged in the transportation of paper and paper products. It would seem that it was for the very purpose of having an administrative body ascertain and deter-

mine just such differences that Congress committed to the Commission the duty of scrutinizing "grandfather" applications. For the Commission's guidance it prescribed the standard of bona fide operation. The Commission could not be expected to be satisfied that a showing of bona fide operation during the "grandfather" period in the transportation of paper and paper products was on a "substantial parity" (*Alton R. R.* v. *United States, supra*), with a showing of bona fide operation during that period in the transportation of general commodities, entitling an applicant to a permanent grant of authority covering "future operations" (*id.*) in the transportation of all commodities suitable for transportation in an ordinary truck, with certain exceptions.

The appellant states that it must necessarily be considered to have been holding itself out to carry general commodities. The first answer to this is that, in the view of the Commission, there must have been service during the "grandfather" period consistent with an applicant's holding out; and this, it would seem, is a very reasonable and necessary principle, and within the province of the Commission to apply. The second answer is that there is no proof that appellant did so hold itself out. The Commission's report states that appellant held itself out to carry general commodities between Birmingham and the five south-

ern States, but appellant cannot advance this with respect to operations in other territory where it is shown to have been transporting during the "grandfather" period only specific commodities (R. 11). Evidence as to holding out may be by way of testimony, rates, solicitation, and advertising in many forms. Testimony has to be considered in the light of circumstances of particular operations. In short, no presumption exists as to a motor carrier's holding out. As stated in *Alton R. R.* v. *United States, supra,* an "applicant carries the burden of establishing his right to the statutory grant."

Unlike the railroads many motor carriers have not been carriers of general freight. As is stated in the fourth Report of the Federal Coordinator of Transportation (House Doc. 394, 74th Cong., 2d Sess., Jan. 21, 1936, at pages 26–27):

> "* * * property carriers * * * are of many kinds and descriptions. Some are common carriers, but many of these confine their operations to *special commodities.* * * *
>
> In general, they are small enterprises. A great number are individuals operating only a single truck. * * * [Italics ours.]

Irregular route operators are in a position to elect to carry only high-class commodities—the cream of the traffic. (See second Coordinator

report, Senate Doc. No. 152, 73d Cong., 2d Sess. (1934), pp. 15, 16 ff., 23–24, 33). The existence of many carriers who confine their operations to particular commodities being well known, Section 203 (a) (14) of the Motor Carrier Act defines a common carrier as a carrier of property "or any class or classes of property."

In *Merchants, etc. Application,* 21 M. C. C. 93, the applicant requested authority under the "grandfather" proviso to transport general commodities throughout a wide territory over irregular and unspecified routes. The Commission found that the evidence justified only a certificate authorizing carriage of certain specified commodities, saying in its report, "the term 'general commodities' is entirely too comprehensive to be used in connection with any authority herein granted, especially when one considers the size, location, and accessibility of the various large cities within the territory involved. Accordingly, the record warrants the conclusion that applicant has been engaged in transportation, in interstate or foreign commerce, only of those commodities which are set forth in appendix B attached" (*id.* at 103). To the same effect are *Powell Application,* 9 M. C. C. 785, 791–792; *Loving Common Carrier Application,* 12 M. C. C. 571; *Eastern Carrier Corp. Common Carrier Application,* 14 M. C. C. 430; *Langer Application,* 23 M. C. C. 302, 305; *Lett Application,* 26 M. C. C. 159, 165.

Appellant advances (Br. 10) as an argument showing that the Commission is without authority to specify the commodities which an applicant for a "grandfather" certificate may carry, the point that the holder of a limited certificate who may at a future time desire to carry a commodity which has "recently come into existence", must file a new application for an additional certificate authorizing the transportation of the new commodity. The necessity for a new certificate would arise likewise when a carrier desires to carry a long-existent commodity in addition to those he is already authorized to handle. There is nothing unreasonable in this. The established carriers having adjusted themselves to the transportation of one commodity by this carrier and another commodity by that, it would obviously be to the detriment of the motor carrier industry if one of their number should be permitted to trench upon the business of another by beginning the carriage of commodities already carried by the other, unless upon a showing that the public convenience and necessity require the change. Many motor carriers holding certificates authorizing the carriage of specific commodities have, without questioning their duty to do so, applied to the Commission for additional certificates which would permit the transportation of additional commodities. The right to a certificate authorizing such additional transportation would, of

course, be based, not upon a vague willingness to carry, of which the public was more or less clearly informed back in 1935, but upon factual showing of public convenience and necessity as of the present time. *Frank T. Geroulo Extension of Operations,* 4 M. C. C. 237; *David S. Campbell Extension of Operation-Spray Materials,* 10 M. C. C. 799; *Clark W. Howell Extension of Operations,* 8 M. C. C. 519; *Joseph H. Smith Extension of Operations,* 12 M. C. C. 211. It is in fact a common practice for holders of "grandfather" certificates covering a specific commodity or commodities to apply for and receive certificates under Section 207 in cases where they desire to enlarge their operations by the inclusion of other commodities subsequent to the "grandfather" date.

Appellant's view that the statute leaves the body administering it without administrative judgment to determine the extent of an applicant's irregular-route operations is shown to be fundamentally wrong by this Court's decision in *Alton R. R.* v. *United States, supra.* Cf. *Gray* v. *Powell* (No. 18, decided December 15, 1941); *Shields* v. *Utah-Idaho Central R. Co.,* 305 U. S. 177.

CONCLUSION

In conclusion we respectfully submit that the decree of the lower court should be affirmed.

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Of Counsel.

JANUARY 1942.

APPENDIX

Statutes involved

Pertinent provisions of the Interstate Commerce Act important in the consideration of this case are:

Part II. "Sec. 206 (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will

be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *."

"Sec. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the car-

rier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

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